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MR E W BURTON IN PRO PER
P.O BOX 5246 - CSATF-A-C1-132L
CORCORAN, CA. 93212

709 F. Supp. 525
U.S District Court
S.D. OHIO
Westlaw
Proctor + Gamble Plaintiffs
Vs
Bankers Trust
NO C1-94-735
DEC. 20. 1995
4TH A

VIOLATION OF 5TH.

right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, AND SEIZURE. PROSECUTIONS USE OF PETITIONERS (ALLEGED) PHOTO WORK ID'S AND CASINO CARD WERE ARE JUDICIAL AND EQUIVALENT TO MAKING Negligent record keeping DEFENDANT A WITNESS AGAINST HIMSELF

United States Supreme Court Decision of Leon in support of its conclusion that it is "useful and proper" to invoke the exclusionary rule where negligent record keeping results in unlawful arrest U.S.A. Const 4.

514 U.S. 1, 131 L.Ed.2d 34, 63 USLW 4179
Supreme Court of the United States
ARIZONA, Petitioner v. Isaac Evans
NO. 93-1660. Argued Dec. 7 1994
Decided March 1, 1995

Court of Appeals 172 Ariz. 314, 836 P.2d 1024

MR. E.W. BURTON #F02720, IN PRO PER
P.O. BOX 5246
CORCORAN, CA. 93212

V. OUTRAGEOUS POLICE CONDUCT

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through West's KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. FAILURE TO PRESERVE EVIDENCE

§ 29:1 Loss of Material Witness

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF S.D

PEOPLE OF THE STATE OF CALIFORNIA, BURTON, E.W. #F02720 Plaintiff, PETITIONER v DIRECTOR OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION Defendant.	Case No.: ______ NOTICE OF MOTION TO DISMISS FOR FAILURE OF PROSECUTION TO PRESERVE MATERIAL WITNESS - HON. JUDGE HALGREN Date: ______ EN (HON. JUDGE HALGREN Time: ______ Place: ______

TO THE DISTRICT ATTORNEY OF S.D COUNTY AND/OR ______ *[HIS OR HER]* REPRESENTATIVE:

PLEASE TAKE NOTICE that on ______ *[date]*, at ______ *[time]*, or as soon thereafter as the matter may be heard in the courtroom of Department ______ of the above-entitled court, the defendant will move for an order dismissing all charges in this action.

This motion will be made on the ground that the actions of members of the E.C. Police Department have prevented the defendant from preparing and presenting a meaningful defense by failing to preserve a material witness in violation of the Sixth Amendment right to compulsory process of witnesses and the Fifth Amendment due process clause. - WITNESS - KIAH MINCEY

The motion will be based on this notice of motion, on the attached declaration and memorandum of points and authorities served and filed herewith, on such supplemental declarations and memoranda of points and authorities as may hereafter be filed with the court, ~~on all the papers and records on file in this action,~~ Crim Court and on such oral and documentary evidence as may be presented at the hearing of the motion.

(3)

tion of either the defendant or his attorney." (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982))

Sanctions: If the government has deprived the defendant of a material witness, the court may dismiss those counts to which the absent witness would have offered evidence or due process may demand the dismissal of all the charges. (Roviaro v. U.S., 353 U.S. 53, 61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957))

Informant witness: If the prosecution revealed the identity of a material witness informant, but does not have a present location for the informant, or if the defense cannot locate the informant after being given an address by the prosecution, the court should conduct a hearing on the reasonableness of the prosecution's good faith efforts to maintain contact with the informant. (Twiggs v. Superior Court, 34 Cal. 3d. 360, 365, 194 Cal. Rptr. 152, 667 P.2d 1165 (1983))

Deported witness: If "state action has made a material witness unavailable (by deportation), dismissal is mandated. (People v. Mejia, 57 Cal. App. 3d 574, 579, 129 Cal. Rptr. 192 (1976)) A person arrested along with an undocumented person may be given a form advising them of the right to have the noncitizen witness detained. (See U.S. v. Lujan-Castro, 602 F.2d 877 (9th Cir. 1979))

Research References

Text References
C.J.S., Criminal Law §§ 476, 486, 510, 1233, 1236, 1246

West's Digest References
Criminal Law ⇐700(10)

§ 29:2 — Declaration

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v _____, Defendant.	Case No.: _____ POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO PRESERVE MATERIAL WITNESS Date: _____ Time: _____ Place: _____

TO THE DISTRICT ATTORNEY OF _____COUNTY AND/OR _____ *[HIS OR HER]* REPRESENTATIVE:

PLEASE TAKE NOTICE that on _____ *[date]*, at _____ *[time]*, or as soon thereafter as the matter may be heard in the courtroom of Department _____ of the above-entitled court, the defendant will move for an order dismissing all charges in this action.

This motion will be made on the ground that the actions of members of the EC Police Department have prevented the DEFENDANT HIS FUNDAMENTAL RIGHT TO DUE PROCESS
468 AND EQUAL PROTECTION UNDER THE 14TH AMENDMENT
DEPRIVING DEFENDANT OF MATERIAL WITNESS BY HOLDING HIS PASSPORT AND COPIES OF RESTRAINING ORDER FROM CLOB.
AN ALLEGED KIDNAPPING (4)

STATEMENT OF FACTS IN SUPPORT OF PETITION ENTITLED
E. W. BURTON #F02720, P.O. BOX 5246-CSATF/SAC1-132L CORCORAN, CA. 93212
ARGUMENT UNITED

States Supreme Court recognized that in order to make a showing of materiality "the defendant cannot be expected to render a detailed description of their lost testimony" (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). To make a showing, counsel may rely on statements by the lost witness to third parties, including those contained in police reports, as well as "the defendant's explanation under oath of such evidence would be an acceptable method of establishing the materiality of the missing witness." (People v. Valencia, 218 Cal. App. 3d 808, 824, 819, 267 Cal. Rptr. 257 (1990))

The Supreme Court recognized that "while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 871, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982))

The High Court cautioned that deference should be paid to the difficulty facing the defense in making a showing of materiality. "As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. (Citation) In making such a determination, courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself." (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873-874, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982))

IV

THE DUE PROCESS CLAUSE IMPOSES A DUTY ON THE POLICE TO MAKE AVAILABLE AN INFORMER MATERIAL WITNESS

When an informer is a material witness on the issue of guilt or innocence, the People must disclose his identity or incur a dismissal. (Roviaro v. U.S., 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); Ev C § 1042) The state does not fulfill its obligation of disclosure when it reveals all that it knows, despite the inadequacy of such data to locate the informer. As the court stated in Eleazer v. Superior Court, 1 Cal. 3d 847, 852-853, 83 Cal. Rptr. 586, 464 P.2d 42 (1970): AN ALLEGED UNDISCLOSED KIAH MINCEY,

472 A CONVICTED FELON, RESIDENT OF THE ALLEGED CRIME SCENE

Error Error

(5)

defendant from preparing and presenting a meaningful defense by failing to preserve a material witness in violation of the Sixth Amendment right to compulsory process of witnesses and the Fifth Amendment due process clause.

The motion will be based on this notice of motion, on the attached declaration and memorandum of points and authorities served and filed herewith, on such supplemental declarations and memoranda of points and authorities as may hereafter be filed with the court, on all the papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____.

_____
Attorney for Defendant

NOTES TO FORM

Research References

Text References
C.J.S., Criminal Law §§ 476, 486, 510, 1233, 1236, 1246

West's Digest References
Criminal Law ⇐700(10)

§ 29:3 —Points and authorities

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. _____, Defendant.	Case No.:_____ POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO PRESERVE MATERIAL WITNESS

Defendant submits the following points and authorities in support of the motion to dismiss for failure to preserve a material witness:

I

GOVERNMENT ACTION WHICH DEPRIVES THE DEFENDANT OF A MATERIAL WITNESS IS A VIOLATION OF DUE PROCESS AND THE RIGHT TO COMPULSORY PROCESS OF WITNESSES

The Sixth Amendment guarantees a defendant the right "to have compulsory process for obtaining witnesses in his favor."

(6)

E.W. BURTON #F02720 IN PROPER
P.O. BOX [illegible]
COR CORAN, CA. 93 [illegible]

STATEMENT OF FACT- PETITIONER WAS NOT PRESENT AS A MATTER OF CONSTITUTIONAL RIGHT ON OR APROXIMATELY 16 JULY 05 WHEN COUNSEL ADAIR WAS GIVEN NOTICE OF CHANGE IN INDICTMENT PETITIONER'S RIGHT TO BE PRESENT + 14TH AMENDMT EQUAL PROTECTION AND DUE PROCESS WAS VIOLATED

ARGUMENT → THE PETITIONER, ERIC WILTON BURTON # F02720 UNCONSTITUTIONALLY AND UNLAWFULLY INCARCERATED MOVES THIS COURT TO GRANT THIS MOTION FOR A NEW TRIAL, AS HIS FEDERALLY GUARANTEED U.S CONSTITUTIONAL RIGHT TO A FAIR TRIAL HAS BEEN BLATANTLY VIOLATED BY THE FAILURE OF PROSECTION TO TIMELY RESPOND TO DEFENSE PRETRIAL MOTIONS FOR DISCOVERY UNDER BRADY AND DUE PROCESS VIOLATIONS BY THE FAILURE OF PROSECUTION TO DISCLOSE DISCOVERY PURSUANT TO UNITED STATES V. AGURS (1976) 427 U.S 97, 49 LEd 2d 342, 96 S.Ct 2392. 5TH + 14TH U.S CONST AMENDMTS

<u>STATEMENT OF FACTS</u> - AS PROSECUTION FAILED TO TIMELY RESPOND TO DEFENSE MOTIONS OF DISCOVERY, DENIED DEFENDANT OF HIS FEDERALLY GUARANTEED RIGHT TO A FAIR AND SPEEDY TRIAL. SEE PEOPLE V. ANDERSON (2001) 25 C. 4TH 543, 603, 604, 106 C.R. 2d 575, 22 P.3d 347 [DEFENDANT'S <u>ASSERTION OF SPEEDY TRIAL RIGHT</u> (THIRD BARKER FACTOR) IS "ENTITLED TO STRONG EVIDENTIARY WEIGHT" ON ISSUE WHETHER DEFENDANT IS BEING DEPRIVED OF THAT RIGHT BECAUSE "[T]HE MORE SERIOUS THE DEPRIVATION, THE MORE LIKELY A DEFENDANT IS TO COMPLAIN". PROSECUTION REARRAIGNED DEFENDANT ON THE DAY OF TRIAL TO GAIN A TACTICAL ADVANTAGE OVER DEFENDANT AND VIOLATED P.C. §1009 WHICH STATES; CERTAIN AMENDMENTS ARE PROHIBITED - THOSE THAT CHANGE THE OFFENSES CHARGED, OR ALTER AN INFORMATION TO ADD CHARGES NOT SUPPORTED BY THE EVIDENCE AT THE PRELIMINARY HEARING, PROSECUTION CHANGED CHARGE INDICTMENT VIOLATING DEFENDANTS 6TH AMENDMENT CONFRONTATION CLAUSE AND RIGHT TO MAKE A DEFENSE. A SHOWING OF BAD FAITH IS NOT REQUIRED FOR PROSECUTORIAL MISSTATEMENTS OF LAW TO CONSTITUTE MISCONDUCT. PEOPLE V. HILL (1998) 17 C. 4TH 800, 822-, 829, 72 C.R. 2d 656, 952 P. 2d 673, SUPP, INFRA, §581. PROSECUTION ALSO VIOLATED DEFENDANTS 5TH + 14TH AMENT. RIGHTS AS FEDERALLY GUARANTEED BY THE US CONSTITUTION. DUE PROCESS + EQUAL PROTECTION

This means that a defendant has a right to present his defense and to call witnesses favorable to him without interference by the prosecutor or other agencies of government. The Supreme Court in several decisions has explored the meaning of the right to compulsory process. In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) in holding this right so fundamental as to be part of the due process clause of the Fourteenth Amendment, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

II

THE FEDERAL STANDARD OF MATERIALITY

The proper standard for determining whether a criminal charge must be dismissed due to state action depriving the defendant of a material witness is the federal standard, which requires a criminal defendant to show that the witness's testimony would have been material and favorable to his defense. Proposition 8 (Cal Const Art I § 28(d) prohibits the exclusion of relevant evidence in criminal proceedings except to the extent federal law compels exclusion. Because dismissal amounts to the exclusion of all evidence against a defendant, a motion for dismissal, based on being deprived of a material witness, triggers the application of the California constitutional provision, and thus the state standard, which did not require defendant's showing of the testimony's favorable nature, was abrogated. (People v. Valencia, 218 Cal. App. 3d 808, 267 Cal. Rptr. 257 (1990)) However, conflicting authority exists on which federal standard to apply.

A. U.S. v Valenzuela-Bernal Standard

In People v. Valencia, 218 Cal. App. 3d 808, 267 Cal. Rptr. 257 (1990) the court followed the most recent United States Supreme Court opinion dealing specifically with the proper federal standard of materiality applicable to the loss of a witness through state action, and held that the charges should not be dismissed unless the defendant "makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to

E. W. BURTON #F02720 IN PROPER
COR CORANCA. 93212

the testimony of available witnesses." (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982))

The Appellate Court reasoned that Trombetta and Valenzuela-Bernal addressed two different aspects of the state's duty to preserve exculpatory evidence. While Trombetta presented an in-depth discussion of the constitutional duty to preserve physical evidence, it was not, in the Appellate Court's opinion, intended to supersede Valenzuela-Bernal's examination of unavailable witnesses. Destroyed Loss 911 tapes recorded over & cell phone

B. California v Trombetta Standard

In People v. Lopez, 198 Cal. App. 3d 135, 243 Cal. Rptr. 590 (1988) the court held the standard of materiality to be applied to the loss of testimonial evidence is that of California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Under this standard the lost evidence is material for the purpose of sanctions if its exculpatory value was apparent before it was lost. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, *[citation]*, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (California v. Trombetta, 467 U.S. 479, 488-489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984))

The Lopez court declined to follow the Valenzuela-Bernal standard because that case is older than Trombetta, and because there was no indication in the opinion that the Supreme Court intended to announce a separate standard for the loss of testimonial evidence as distinguished from the loss of other evidence.

The California Supreme Court in addressing a claim that a prosecutor's failure to tape record the entire interview with a key prosecution witness deprived the defendant of substantial evidence, applied the federal standard of Trombetta without deciding which standard applied. (People v. Fauber, 2 Cal. 4th 792, 829, 9 Cal. Rptr. 2d 24, 831 P.2d 249 (1992))

III

THE SUFFICIENCY OF ANY REQUIRED SHOWING OF MATERIALITY

Even if this court adopts the Valenzuela-Bernal standard, the showing of materiality must be viewed liberally. ~~The United~~ [illegible]

(9)

STATEMENT OF FACTS (ERROR) Errors
E. W. BURTON #FO2720, IN PRO PER
P.O. BOX 5244-CSATP/SD-C1-132L
CORCORAN, CA. 93212

Dated: 9-23-07

ERIC W. BURTON #FO2720
Attorney for Defendant IN PRO PER

~~NOTES TO FORM~~ Error

Authorities

U.S. v. Valenzuela-Bernal, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)

Eleazer v. Superior Court, 1 Cal. 3d 847, 852-853, 83 Cal. Rptr. 586, 464 P.2d 42 (1970)

People v. Valencia, 218 Cal. App. 3d 808, 267 Cal. Rptr. 257 (1990)

People v. Jenkins, 190 Cal. App. 3d 200, 235 Cal. Rptr. 268 (1987)

People v. Lopez, 198 Cal. App. 3d 135, 243 Cal. Rptr. 590 (1988)

ARGUMENT ~~Commentary~~ Error Error ~~Statement of Facts~~ IN SUPPORT OF PETITION

The Sixth Amendment guarantees a defendant the right "to have compulsory process for obtaining witnesses in his favor." This means that a defendant has a right to present his defense and to call witnesses favorable to him without interference by the prosecutor or other agencies of government. If the state takes action that prevents the defendant from presenting an adequate defense in violation of his constitutional guarantees, the case may be dismissed in furtherance of justice. Such action includes causing a material witness to be unavailable to testify at trial. These situations most commonly arise when the state causes material witnesses to be deported (People v. Mejia, 57 Cal. App. 3d 574, 129 Cal. Rptr. 192 (1976)); or the police lose contact with a police informant (Eleazer v. Superior Court, 1 Cal. 3d 847, 852-853, 83 Cal. Rptr. 586, 464 P.2d 42 (1970)); or lose the records identifying a material civilian witness (People v. Gonzales, 209 Cal. App. 3d 1228, 257 Cal. Rptr. 828 (1989)).

Materiality standard: The defendant must show there was a reasonable possibility the unavailable witness could have offered favorable evidence on guilt or innocence. The defendant must meet the federal materiality standard contained in U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982), by making a "plausible showing that the testimony of the deported witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." The less rigid rule of People v. Mejia, 57 Cal. App. 3d 574, 129 Cal. Rptr. 192 (1976), has been abrogated by Proposition 8 (Cal Const Art I § 28(d)) (People v. Valencia, 218 Cal. App. 3d 808, 819, 267 Cal. Rptr. 257 (1990)).

Sufficiency of showing: The United States Supreme Court recognized that in order to make a showing of materiality "the defendant cannot be expected to render a detailed description of their lost testimony" (U.S. v. Valenzuela-Bernal, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). To make a showing, counsel may rely on statements by the lost witness to third parties, including those contained in police reports, or "the defendant's explanation under oath of such evidence would be an acceptable method of establishing the materiality of the missing witness." (People v. Valencia, 218 Cal. App. 3d 808, 824, 819, 267 Cal. Rptr. 257 (1990)) The showing must be based on "reasonable possibilities and not on sheer and unreasonable speculation." (People v. Jenkins, 190 Cal. App. 3d 200, 207, 235 Cal. Rptr. 268 (1987)) Because "the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of (the loss of the witness), it should be verified by oath or affirmation.

10

E.W. BURTON #F02720 CORCORAN CA. 93212

The motion will be made on the ground that the defendant was committed without reasonable or probable cause because the commitment was based upon incompetent evidence.

The motion will be based on this notice of motion, on the memorandum of points and authorities served and filed herewith, ~~on the transcript of the preliminary examination,~~ on such supplemental memoranda of points and authorities as may be filed hereafter with the court, and on such oral argument as may be presented at the hearing on this motion.

Dated: ________.

____

Attorney for Defendant

~~NOTES TO FORM~~

Authorities

Pen C §§ 995-999a, 1510

Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956)

People v. Scoma, 71 Cal. 2d 332, 335, 78 Cal. Rptr. 491, 455 P.2d 419 (1969)

People v. Lilienthal, 22 Cal. 3d 891, 897, 150 Cal. Rptr. 910, 587 P.2d 706 (1978)

People v. Sherwin, 82 Cal. App. 4th 1404, 1408, 98 Cal. Rptr. 2d 888 (2000)

Commentary

A defendant cannot be held to answer upon evidence obtained in an illegal search and seizure. A defendant is held to answer without reasonable or probable cause within the meaning of § 995 when the only substantial evidence supporting his commitment has been obtained in violation of the 14TH ~~Fourth~~ Amendment. (People v. Scoma, 71 Cal. 2d 332, 335, 78 Cal. Rptr. 491, 455 P.2d 419 (1969); People v. Lilienthal, 22 Cal. 3d 891, 897, 150 Cal. Rptr. 910, 587 P.2d 706 (1978)) If a motion to suppress was made at the preliminary examination, the defendant has two methods of challenging the admissibility of illegally obtained evidence. First, the Pen C § 1538.5 motion may be renewed in the superior court, on 10 days notice, but any evidence presented by the defense is restricted to the evidence contained in the transcript of the preliminary examination unless: (1) the parties agree otherwise; (2) a party has other evidence that could not have reasonably been presented at the preliminary examination; or (3) the People wish to recall a witness who had previously testified at the preliminary examination. (Pen C § 1538.5(i); People v. Hansel, 1 Cal. 4th 1211, 4 Cal. Rptr. 2d 888, 824 P.2d 694 (1992))

Second, if a motion to suppress was made at the preliminary examination, the defendant may lodge a § 995 motion based upon the testimony contained in the transcript of the preliminary hearing. Penal Code § 1538.5(n) specifically states that "Nothing in this section shall be construed as altering . . . (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures which may be initiated after the granting or denial of such a motion."

Magistrate's findings: In ruling on a renewal of a suppression motion, the superior court independently decides the legal issues, but is bound by any factual findings made by the magistrate. (Pen C § 1538.5(i); People v.

~~Memro, 11 Cal. 4th 786, 846, 12 Cal. 4th 783d, 47 Cal. Rptr. 2d 219, 905 P.2d 1305 (1995)). The reviewing judge must accept as true the evidence supporting the magistrate's decision. (People v. Lawler, 9 Cal. 3d 156, 160, 107 Cal. Rptr. 13, 507 P.2d 624 (1973))~~ The reviewing judge must determine independently whether the magistrate's application of the law to the facts was correct. (People v. Leyba, 29 Cal. 3d 591, 174 Cal. Rptr. 867, 629 P.2d 961 (1981))

~~**Suppression motion must be made at preliminary:** If the defense did not make a Pen C § 1538.5 suppression motion at the preliminary hearing, the evidence cannot be challenged by a § 995 motion. (People v. Anderson, 210 Cal. App. 3d 24, 28, 258 Cal. Rptr. 125 (1989))~~

Research References

Text References
C.J.S., Criminal Law §§ 770-798

West's Digest References
Criminal Law ⚿394

§ 20:8 —Points and authorities

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v _____, Defendant.	Case No.: _____ POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE INFORMATION

Defendant submits the following memorandum of points and authorities in support of the motion to set aside the information:

I

SUMMARY OF FACTS

[Counsel should set forth a summary of the evidence contained in the preliminary hearing transcript and the magistrate's findings of fact, if any.]

II

A DEFENDANT CANNOT BE HELD TO ANSWER IF DEFENDANT'S COMMITMENT IS BASED UPON INCOMPETENT EVIDENCE

An order to set aside an information pursuant to Pen C § 995 may be based upon a determination that the evidence to support the information was the product of an illegal search and seizure. (People v. Superior Court, 276 Cal. App. 2d 581, 586, 81 Cal. Rptr. 42 (1969)). "When the only substantial evidence supporting

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the commitment has been obtained in violation of the ~~Fourth~~ Amendment, a defendant is held to answer without reasonable or probable cause within the meaning of section 995 of the Penal Code." (People v. Whyte, 90 Cal. App. 3d 235, 240, 152 Cal. Rptr. 280 (1979)).

> "[A] defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence," [citation omitted] and accordingly, in such a case the trial court should grant a motion to set aside the information. . . . No problem is presented in applying this rule in cases involving searches and seizures in which the facts bearing on the legality of the search and seizure are undisputed and establish as a matter of law that the evidence is or is not admissible.(Badillo v. Superior Court, 46 Cal. 2d 269, 271, 294 P.2d 23 (1956)).

NOTES TO FORM

Commentary

~~Counsel should, of course, supplement the points and authorities with sections summarizing the testimony at the preliminary hearing and the applicable case law concerning the specific Fourth Amendment violation.~~

Research References

Text References
C.J.S., Criminal Law §§ 770-798

West's Digest References
Criminal Law ⇦394

§ 20:9 Inadmissable hearsay

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v _____, Defendant.	Case No.: _____ NOTICE OF MOTION TO SET ASIDE INFORMATION (Pen C § 995) Date: _____ Time: _____ Place: _____

TO THE DISTRICT ATTORNEY OF _____ COUNTY AND/OR _____ *[HIS OR HER]* REPRESENTATIVE:

PLEASE TAKE NOTICE that on _____ *[date]*, at the hour of _____ or as soon thereafter as the matter may be heard in the courtroom of Department _____ of the above-entitled court, the defendant will move for an order setting aside the information filed herein.

The motion will be made on the grounds that the defendant was committed without reasonable or probable cause.

they failed to take steps to preserve or obtain the following physical evidence: 911 TAPES *[Specify evidence].*

3. This physical evidence would have been material and favorable to the defense in that: *[Specify the materiality and benefit of this type of evidence].*

I declare under penalty of perjury that the foregoing is true and correct except as to matters stated on information and belief, and as to those matters, I believe them to be true.

Executed on _____ *[date]*, at _____, California.

_____
Attorney for Defendant

NOTES TO FORM

Research References

Text References
C.J.S., Criminal Law §§ 486, 510, 541-546, 1233, 1236

West's Digest References
Criminal Law ⇨700(9)

§ 29:6 — Points and authorities

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v _____, Defendant.	Case No. _____ POINTS AND AUTHORITIES IN SUPPORT OF ~~MOTION~~ Petition TO EXCLUDE EVIDENCE

Defendant submits the following points and authorities in support of the motion for sanctions:

I

DUE PROCESS IS VIOLATED IF THE POLICE FAIL TO PRESERVE EXCULPATORY EVIDENCE

In California v. Trombetta, 467 U.S. 479, 488-489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), the Supreme Court evaluated the government's duty to take affirmative steps to preserve physical evidence on behalf of defendants.

Whatever duty the Constitution imposes on the States to preserve evidence, ~~that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation omitted], evi-~~ EXCULPATORY EXCULPATORY

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HERE DEFENDANT HAD A TRO SERVED BY JUDGE HALGRENS ORDER 3 WKS PRIOR TO ALLEGED CRIME ON THOMAS ALLEGED VICTIM

ARGUMENT

DUE PROCESS IS VIOLATED WHEN A STATE FAILS TO FOLLOW ITS OWN ESTABLISHED CRIMINAL PROCEDURES AND VIOLATES ITS OWN STATUTES OR CONSTITUTION: HICKS V. OKLAHOMA (1980) 447 U.S. 343 [100 S. Ct. 2227, 65 L.Ed.2d 175]. THE STATES VIOLATIONS OF ITS OWN EVIDENTIARY RULES RESULTED IN A DENIAL OF FUNDEMENTAL FAIRNESS. ESTELLE V. MCGUIRE (1991) 502 U.S. 62, 70 [112 S.CT. 475, 481; 116 L.Ed.2d 385]. AMENDMENT XIV SECTION I - ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS" ARTICLE IV SECTION 4. PROTECTION OF STATES GUARANTEED - THE UNITED STATES SHALL GUARANTEE TO EVERY STATE IN THIS UNION A PUBLICAN FORM OF GOVERNMENT, AND SHALL PROTECT EACH OF THEM AGAINST INVASION AND ON APPLICATION OF THE LEGISLATURE, OR OF THE EXECUTIVE (WHEN THE LEGISLATURE CANNOT BE CONVENED) AGAINST DOMESTIC VIOLENCE. A CRIMINAL DEFENDANT IS ENTITLED TO NOTICE OF THE CHARGES AGAINST HIM, PEOPLE V. PERCELLE, 126 CAL. APP 164, 23 CAL. RPTR. 3d 731 (6th DIST 2005). [ARTICLE I SECTION 7(A) A PERSON MAY NOT BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW OR DENIED EQUAL PROTECTION OF THE LAWS... SEE PEOPLE V. BATTS (2003) 30 C.4TH 660, 697, 134 C.R.2d 67, 68 P.3d 357, 1 CAL. CRIM LAW 3d DEFENSES, SUPP. § 127.

Conflict of Interest
West's annotated California Codes
Government Code
Title 9. Political Reform
Chapter 1. General
§ 81008. Public records, inspection and reproduction, time, charges
(a) Every report and statement filed pursuant to this title is a public record open for public inspection and reproduction during regular business hours

Right to representation by counsel
Code of Civ. Proce. § 128.7

Disclose Discovery Cases.
Strickler

Marcus Thornton Petitioner
v.
United States
No. 03-5165
May 24, 2004

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ARGUMENT

SEE BANKS V. DRETKE (2004) 540 U.S. 668, 124 S.CT. 1256, 1275, 157 L.ED.2d 1166, 1193.
[EMPHASIZING SPECIAL ROLE OF PROSECUTOR IN SEARCH FOR TRUTH IN CRIMINAL TRIALS; COURTS, LITIGANTS, AND JURIES PROPERLY ANTICIPATE THAT PROSECUTION WILL REFRAIN FROM IMPROPER METHODS TO SECURE CONVICTION]. AFTER AN INDICTMENT HAS BEEN RETURNED AND CRIMINAL PROCEEDINGS ARE UNDERWAY THE INDICTMENTS CHARGES MAY NOT BE BROADENED BY AMENDMENTS EITHER LITERAL OR CONSTRUCTIVE EXCEPT BY THE GRAND JURY ITSELF. U.S V. ADAMSON, 291 F.3d 606 (9TH CIR. 2002

AS THE EXCERPTS SHOW, PROSECUTIONS ARRAIGNMENT OF DEFENDANT WITHOUT PRIOR NOTICE ON AMENDED CHARGES, WAS DONE TO GAIN AN UNFAIR TACTICAL ADVANTAGE OVER DEFENDANT, AS DEFENSE COUNSEL ADAIR WAS ALLEGED TO HAVE BEEN GIVEN NOTICE PRIOR TO TRIAL. DEFENDANT WAS NOT, IN ADDITION HAD BEEN DENIED HIS FEDERALLY GUARANTEED RIGHT TO BE PRESENT IN COURT, BOTH IN OR ABOUT 14 MARCH 05, WHEN THE CASE WAS TRIAL WITHOUT PETITIONER BEING GIVEN NOTICE, AND ON OR ABOUT 16 JUNE 05, AND PETITIONER BELIEVES PERHAPS ALSO ON OR ABOUT JAN-16-05?. PROSECUTION, AFTER A DEFENSE MOTION HAD BEEN FILED AND SERVED ON D.A. HANNAH WITH NO ALLEGED RESPONSE, AND REBUTTED BY PROSECUTOR MR. TROCHA ON R.T. EX CERP 329, FAILED TO DISCLOSE KIAH MINCEY, AN ALLEGED VICTIM, NOT ON PROSECUTIONS TRIAL WITNESS LIST. DEFENDANT NOT GIVEN PRIOR OPPORTUNITY TO CROSS EXAMINE A. KIAH MINCEY, PROSECUTION FAILED TO DISCLOSE THE TRIER OF FACT TO DEFENSE, AS A MATERIAL WITNESS OF FACT ON STIPULATED COURT GENUINE BUSINESS COURT CLERK RECORDS, AND U.S. SHERIFF'S MARSHALL RECORDS AS THE HON. L. HALCK SIGNED OFF ON THE RESTRAINING ORDER,

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AND ISSUED A TRO PROTECTING PETITIONER MR. BURTON AND HIS MINOR DAUGHTER DREONA BURTON FROM MR THOMAS ALLEGED VICTIM, AS MR. THOMAS WAS SHOWN STALKING PETITIONER ON OR ABOUT 23 FEB 04. IN PRESENCE OF HON. JUDGE HALGREN, AND MR. THOMAS WAS SERVED BY HER BALIFF, OF WHICH ALSO PROSECUTION FAILED TO DISCLOSE, THUS VIOLATING PETIONER'S FEDERALLY GUARANTEED U.S CONSTITUTIONAL 14TH AMENDMENT DUE PROCESS AND EQUAL PROCTECTION CLAUSES INCLUDING FEDERALLY GUARANTEED RIGHT TO NOTICE, AND COMPULSORY PROCESS. PETITIONER WAS PREVENTED BY TRIAL JUDGE FROM MAKING ANY MOTIONS OR OBJECTIONS. AS DEFENSE COUNSEL ADAIR FAILED TO OBJECT TO PETITIONER RECEIVING A CONVICTION AND SENTENCE OF A CULMULATIVE UNCHARGED UNPROVEN ALLEGED CRIME AGAINST A KIAH MINCEY, PETITIONER HAD NO PRIOR OPPORTUNITY TO EXAMINE THIS DEPORTED WITNESS. FUTHERMORE PROSECUTION FAILED TO DISCLOSE TO DEFENSE AFTER A DISCOVERY MOTION HAD BEEN FILED TO DISCLOSE THAT MR. KIAH MINCEY RESIDENT OF THE FALSELY ALLEGED CRIME SCENE WAS A CONVICTED FELON, WHO WAS A LITIGANT REPRESENTING THE VISUALLY IMPAIRED IN A CLASS ACTION SUIT AGAINST A CALIFORNIA GOVERNOR. THIS QUESTION'S THE WHOLE CREDIBILITY OF PROSECUTIONS CASE OF BY WHICH FALSE EVIDENCE OF A BLACK PHONE WITH CONTAMINANT ALLEGED TO BE HELD BY MR. THOMAS, OF WHOM ALLEGEDLY RAN INSIDE MR. MINCEYS RESIDENCE AFTER HIS ALLEGED ACCIDENT ON THE DAY IN QUESTION. MR. THOMAS TESTIFIED THAT MR. MINCEY GAVE HIM INSTRUMENTS TO HARASS ALLEGED DEFENDANT. IT IS BELIEVED THAT MR MINCEY AND MR. THOMAS WERE IN PRISON TOGETHER AT CHUCAWALA STATE PRISON. PROSECUTION FAILED TO DISCLOSE FAVORABLE EVIDENCE OF MR. MINCEY'S CRIMINAL HISTORY AFTER A DEFENSE MOTION FOR DISCOVERY HAD BEEN FILED. THE SUBSEQUENT TRIAL OF DEFENDANT

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AS IN NEWBERRY SUPRA, AS QUOTED IN ILLINOIS V. FISHER CITE AS 124 S.CT. 1200 (2004) VIOLATED PETITIONERS FEDERALLY GUARANTEED 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES.

SEE- ILLINOIS V. NEWBERRY 166 ILL. 2d 310, 209 ILL. DEC. 748, 652 N.E. 2d 288 (1995) THE APPELLATE COURT REASONED "~~WHERE EVIDEN~~ EXONERATORY - SUBSEQUENT TO A DISCOVERY MOTION BY THE DEFENDANT. APP. TO PET. FOR CERT 13, WHILE ACKNOWLEDGING THAT "THERE IS NOTHING IN THE RECORD TO [540 U.S. 547] INDICATE THAT THE ALLEGED COCAINE WAS DESTROYED IN BAD FAITH" id AT 15 THE COURT FURTHER DETERMINED THAT NEWBERRY DICTATED DISMISSAL BECAUSE, UNLIKE IN YOUNGBLOOD THE DESTROYED EVIDENCE PROVIDED RESPONDENTS "ONLY HOPE FOR EXONERATION." APP. TO PET. FOR CERT - 124 S.CT 1202. "WE HAVE HELD THAT WHEN THE STATE SUPPRESSES OR FAILS TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE, THE GOOD OR BAD FAITH OF THE PROSECUTION IS WITHHELD. SEE BRADY V. MARYLAND 373 U.S. 83 S.CT. 1194, 10 L.Ed. 2d 215 (1963); US V. AGURS, 427 U.S. 97, 96 S.CT. 2392, 49 L.Ed. 2d 342 (1976).

IN ADDITION THE POLICE DESTRUCTION OF THE ALLEGED 911 TAPES, AS PROSECUTION ALLEGED INADVERTENTLY DESTROYED. PETITIONER CONTENDS THAT THE TAPES WERE DESTROYED SUBSEQUENT TO HIS DEFENSE MOTIONS FOR DISCOVERY BOTH INFORMAL BY LETTER OF MR. PLUMMERS REQUESTING TAPES ON 7-06-04 APPROX. AND HIS MOTION FOR DISCOVERY SERVED ON MS. HANNAH, YET NEVER HEARD, TAKEN OFF CALENDAR WITHOUT WRITTEN NOTICE TO DEFENDANT. THE HON. JUDGE PRECKEL'S DENIAL AS A MATTER OF RIGHT TO AN IN CAMERA HEARING BOTH BY MOTION OF DEFENDANT AND COUNSEL AT THE 1538.5 HEARING DEPRIVED PETITIONER OF HIS FEDERALLY GUARANTEED 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES.

ARGUMENT-PETITIONER WAS DENIED HIS RIGHT TO NOTICE AND PRIOR OPPORTUNITY TO CROSS EXAMINE ALLEGED VICTIM KIATH MINCEY THAT PROSECUTION FAILED TO DISCLOSE AT TRIAL, IN VIOLATION OF PETITIONERS 5TH AND 14TH AMEND. DUE PROCESS AND EQUAL PROTECTION CLAUSES - SEE CRAWFORD V. WASHINGTON - (2004) 541 U.S. 36, 124 S.CT. 1334, 1365, 158 L.Ed. 2d 177, 184, 3 CAL EVIDENCE

STATEMENT OF FACTS - THE DEPORTATION OF THE HON. JUDGE HALGREN'S TESTIMONIAL ON GENUINE COURT OFFICIAL BUSINESS RECORDS VIOLATED PETITIONERS FEDERALLY GUARANTEED 14TH AMENDMENT'S DUE PROCESS AND EQUAL PROTECTION CLAUSES, AND RIGHT TO MAKE A DEFENSE, AND VIOLATED PETITIONERS FEDERALLY GUARANTEED FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE U.S. CONSTITUTION

~~STATEMENT OF FACTS~~ INCORP ARGUMENT

ACCORDINGLY, THE APPROPRIATE TEST FOR PREJUDICE FINDS IT'S ROOTS IN THE TEXT FOR MATERIALITY OF EXCULPATORY INFORMATION NOT DISCLOSED TO THE DEFENSE BY THE PROSECUTION, UNITED STATES V. AGURS, 427 U.S., AT 104, 112-113, 96 S.CT., AT 2397, 2401-2402, AND IN THE TEST FOR MATERIALITY OF TESTIMONY MADE UNAVAILABLE TO THE DEFENSE BY GOVERNMENT DEPORTATION OF A WITNESS, UNITED STATES V. VALENZUELA-BERNAL, SUPRA, 458 U.S., AT 872-874, 102 S.CT., AT 3449-3450, E.G. HON. JUDGE LAURA HALGREN ON GENUINE COURT BUSINESS RECORDS AND U.S. MARSHALL'S SERVICE BUSINESS RECORDS. SEE CODE. CIV. PROC. § 2033.280; CODE CIV. PROC. § 2031.010; § CODE CIV PROC. § 2031.020; CODE CIV. PROC. § 2032. 250. CODE CIV. PROC. § 2017.010

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CONTENTION

GROUND 1 VIOLATION OF THE U.S. CONSTITUTION 14TH AMENDMENT BOTH DUE PROCESS AND EQUAL PROTECTION CLAUSES FOR PROSECUTIONS (ACCUSATIONAL DELAY: DENIAL OF RIGHT TO A SPEEDY TRIAL) DELAY AND CHANGING BEFORE ACCUSATION, DENIAL OF RIGHT TO CHARGING INDICTMENT NOTICE AND SPEEDY TRIAL RIGHT BY ARRAINING DEFENDANT ON AN AMENDED COMPLAINT ON THE DAY OF TRIAL TO GAIN AN UNFAIR TACTICAL ADVANTAGE OVER PETITIONER.

STATEMENT OF FACTS ON JUNE 16 05, PETITIONERS ATTORNEY ADAIR WAS PRESENT IN COURT FOR REARRAIGNMENT, PETITIONER WAS DENIED HIS FEDERALLY GUARANTEED 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSE RIGHT TO BE PRESENT TO DEFEND AND TESTIFY AND DENIED HIS RIGHT TO NOTICE - PETIONER ARRAIGNED DAY OF TRIAL 7-19-05

ARGUMENT -

UNDER FEDERAL CONSTITUTION

SEE THE BARKER FACTORS - BARKER V. WINGO (1972) 407 U.S. 514, 92 S.CT. 2182, 33 L.Ed. 2d 101, TEXT, P. 423 FEDERAL BALANCING TEST

SEE ALSO PEOPLE V. ANDERSON (2001) 25 C. 4TH 543, 603, 604, 106 C.R. 2d 575, 22 P.3d 347 [DEFENDANT ASSERTION OF SPEEDY TRIAL RIGHT (THIRD BARKER FACTOR) IS "ENTITLED TO STRONG EVIDENTIARY WEIGHT" ON ISSUE WHETHER DEFENDANT IS BEING DEPRIVED OF THAT RIGHT BECAUSE "[T]HE MORE SERIOUS THE DEPRIVATION, THE MORE LIKELY A DEFENDANT IS TO COMPLAIN". WESTKEY NUMBER DIGEST CRIM. LAW. 577.10(1) AS QUOTED IN FARETTA V. CALIFORNIA CITE AS 95 S.CT. 2525 (1975) THIS COURT HAS OFTEN RECOGNIZED THE CONSTITUTIONAL STATURE OF RIGHTS THAT, THOUGH NOT LITERALLY EXPRESSED IN THE DOCUMENT, ARE ESSENTIAL TO DUE PROCESS OF LAW IN A FAIR ADVERSARY PROCESS. IT IS NOW ACCEPTED, FOR EXAMPLE, THAT AN ACCUSED HAS A RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL WHERE HIS ABSENCE

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MIGHT FRUSTRATE THE FAIRNESS OF THE PROCEEDINGS, SNYDER V. MASSACHUSETTS, 291 U.S. 97, 54 S.CT. 330, 78 L.Ed. 674; TO TESTIFY ON HIS OWN BEHALF, SEE HARRIS V. NEW YORK, 401 U.S. 222, 225, 91 S.CT. 643, 645, 28 L.Ed.2d 1; BROOKS V. TENNESEE, 406 U.S. 605, 612, 92 S.CT. 1891, 1895, 32 L.Ed.2d 358; cf. FERGUSON V. GEORGIA, 365 U.S. 570, 81 S.CT. 756, 5 L.Ed.2d 783 AND TO BE CONVICTED ONLY IF HIS GUILT IS PROVED BEYOND A REASONABLE DOUBT, In re WINSHIP, 397 U.S. 358, 90 S.CT. 1068, 25 L.Ed.2d 368; MULLANEY V. WILBUR, 421 U.S. 684, 95 S.CT. 1881, 44 L.Ed.2d 508.

BECAUSE THESE RIGHTS ARE BASIC TO OUR ADVERSARY SYSTEM OF CRIMINAL JUSTICE, THEY ARE PART OF THE "DUE PROCEW OF LAW" THAT IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO DEFENDANTS IN THE CRIMINAL COURTS OF THE STATES. THE RIGHTS TO NOTICE, CONFRONTATION, AND COMPULSORY PROCESS, WHEN TAKEN TOGETHER, GUARANTEE THAT A CRIMINAL CHARGE MAY BE ANSWERED IN A MANNER NOW CONSIDERED FUNDAMENTAL TO THE FAIR ADMINISTRATION OF AMERICAN JUSTICE — THROUGH THE CALLING AND INTERROGATION OF FAVORABLE WITNESSES, THE CROSS-EKAMINATION OF ADVERSE WITNESSES, AND THE ORDERLY INTRODUCTION OF EVIDENCE. IN SHORT, THE AMENDMENT CONSTITUTIONALIZES THE RIGHT IN AN ADVERSARY CRIMINAL TRIAL TO MAKE A DEFENSE AS WE KNOW IT. SEE CALIFORNIA V. GREEN, 399 U.S. 149, 176, 90 S.CT. 1930, 1944, 26 L.Ed.2d 489 (HARLAN J., CONCURRING), THE SIXTH AMENDMENT DOES NOT PROVIDE MERELY THAT A DEFENSE SHALL BE MADE FOR THE ACCUSED; IT GRANTS TO THE ACCUSED PERSONALLY THE RIGHT TO MAKE HIS DEFENSE. IT IS THE ACCUSED, NOT COUNSEL, WHO MUST BE "INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION," WHO MUST BE "CONFRONTED WITH THE WITNESSES AGAINST HIM," AND WHO MUST BE ACCORDED "COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR". ALTHOUGH NOT STATED IN THE AMENDMENT IN SO MANY WORDS, THE RIGHT TO SELF-REPRESENTATION — TO MAKE ONE'S OWN DEFENSE PERSONALLY — IS THUS IMPLIED BY THE

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STRUCTURE OF THE AMENDMENT, THE RIGHT TO DEFEND IS GIVEN DIRECTLY TO THE ACCUSED; FOR IT IS HE WHO SUFFERS THE CONSEQUENCES IF THE DEFENSE FAILS. THE COUNSEL PROVISION SUPPLEMENTS HIS DESIGN. IT SPEAKS OF THE "ASSISTANCE" OF COUNSEL, AND AN ASSISTANT, HOWEVER EXPERT, IS STILL AN ASSISTANT. THE LANGUAGE AND SPIRIT OF THE SIXTH AMENDMENT CONTEMPLATE THAT COUNSEL, LIKE THE OTHER DEFENSE TOOLS GUARANTEED BY THE AMENDMENT, SHALL BE AN AID TO A WILLING DEFENDANT - NOT AN ORGAN OF THE STATE INTERPOSED BETWEEN AN UNWILLING DEFENDANT AND HIS RIGHT TO DEFEND HIMSELF PERSONALLY. TO THRUST COUNSEL UPON THE ACCUSED, AGAINST HIS CONSIDERED WISH, THUS VIOLATES THE LOGIC OF THE AMENDMENT. IN SUCH CASE, COUNSEL IS NOT AN ASSISTANT, BUT A MASTER; AND THE RIGHT TO MAKE A DEFENSE IS STRIPPED OF THE PERSONAL CHARACTER UPON WHICH THE AMENDMENT INSISTS. AN UNWANTED COUNSEL "REPRESENTS" THE DEFENDANT ONLY THROUGH A TENUOUS AND UNACCEPTABLE LEGAL FICTION. UNLESS THE ACCUSED HAS ACQUIESCED IN SUCH REPRESENTATION, THE DEFENSE PRESENTED IS NOT THE DEFENSE GUARANTEED HIM BY THE CONSTITUTION, FOR, IN A VERY REAL SENSE, IT IS NOT HIS DEFENSE. IN U.S. V. PLATTNER, 330 F.2d 271, THE COURT OF APPEALS FOR THE SECOND CIRCUIT EMPHASIZED THAT THE SIXTH AMENDMENT GRANTS THE ACCUSED THE RIGHTS OF CONFRONTATION, OF COMPULSORY PROCESS FOR WITNESSES IN HIS FAVOR, AND OF ASSISTANCE OF COUNSEL AS MINIMUM PROCEDURAL REQUIREMENTS IN FEDERAL CRIMINAL PROSECUTIONS. THE RIGHT TO THE ASSISTANCE OF COUNSEL, THE COURT CONCLUDED, WAS INTENDED TO SUPPLEMENT THE OTHER RIGHTS OF THE DEFENDANT, AND NOT TO IMPAIR "THE ABSOLUTE ANY PRIMARY RIGHT TO CONDUCT ONE'S OWN DEFENSE IN PROPRIA PERSONA". Id, AT 274. THE COURT FOUND SUPPORT FOR IT'S DECISION IN THE LANGUAGE OF THE 1789 FEDERAL STATUTES AND RULES GOVERNING CRIMINAL PROCEDURE, SEE

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STATUTES - U.S.C. §1654, AND FED. RULE CRIM. PROC. 44;

~~AND~~ IN THE MANY STATE CONSTITUTIONS THAT EXPRESSLY GUARANTEE SELF-REPRESENTATION; AND IN THIS COURT'S RECOGNITION OF THE RIGHT IN ADAMS AND PRICE, ON THE GROUNDS THE COURT OF APPEALS HELD THAT IMPLICIT IN THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS OF LAW, AND IMPLICIT ALSO IN THE SIXTH AMENDMENTS GUARANTEE OF A RIGHT TO THE ASSISTANCE OF COUNSEL, IS "THE RIGHT OF THE ACCUSED PERSONALLY TO MANAGE AND CONDUCT HIS OWN DEFENSE IN A CRIMINAL CASE." 330 F.2d. AT 274. "IN ALL CRIMINAL PROCECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT... TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION;

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ARGUMENT

SEE IN ILLINOIS V. GREGORY FISHER. NO. 03.374 (2-23-2004) CITE AS 124 S.CT. 1200 (2004) — THE APPELLATE COURT REVERSED THE CONVICTION, HOLDING THAT THE DUE PROCESS CLAUSE REQUIRED DISMISSAL OF THE CHARGE RELYING ON THE ILLINOIS SUPREME COURT'S DECISION IN ILLINOIS V. NEWBERRY 166 ILL.2d. 310, 209 ILL DEC. 748, 652 N.E.2d 288 (1995) THE APPELLATE COURT REASONED:

"WHERE EVIDENCE IS REQUESTED BY THE DEFENSE IN A DISCOVERY MOTION, THE STATE IS ON NOTICE THAT THE EVIDENCE MUST BE PRESERVED, AND THE DEFENSE IS NOT REQUIRED TO MAKE AN INDEPENDANT SHOWING THAT THE EVIDENCE HAS EXCULPATORY VALUE IN ORDER TO ESTABLISH A DUE PROCESS VIOLATION. IF THE STATE PROCEEDS TO DESTROY THE EVIDENCE, APPROPRIATE SANCTIONS MAY BE IMPOSED EVEN IF THE DESTRUCTION IS INADVERTENT. NO SHOWING OF BAD FAITH IS NECESSARY." APP. TO PET. FOR CERT. 12 (QUOTING NEWBERRY, SUPRA, AT 317, 209 ILL. DEC. AT 752, 652 N.E.2d, AT 292) (~~CITATION OMITTED~~) SUPREME

THE APPELLATE COURT OBSERVED THAT NEWBERRY DISTINQUISHED OUR DECISION IN YOUNGBLOOD ON THE GROUND THAT THE POLICE IN YOUNGBLOOD DID NOT DESTROY EVIDENCE SUBSEQUENT TO A DISCOVERY MOTION BY THE DEFENDANT. APP. TO PET. FOR CERT. 13

CONSEQUENTLY, THE COURT CONCLUDED THAT RESPONDENT "WAS DENIED DUE PROCESS WHEN HE WAS TRIED SUBSEQUENT TO THE DESTRUCTION OF THE ALLEGED COCAINE." APP. TO PET. FOR CERT 16. THE ILLINOIS SUPREME COURT DENIED LEAVE TO APPEAL. THE ALLEGED INADVERTENT DESTRUCTION OF 911 TAPES BY THE E.C. POLICE AFTER A FILED AND SERVED DEFENSE MOTION FOR DISCOVERY VIOLATED PETITIONERS 14TH U.S. CONST AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES.

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ARGUMENT-

PETITIONER HAVING NO PRIOR CONVICTION, AND AFTER BEING ACQUITTED IN A CLOSE CASE OF COUNT 4 WITHOUT NOTICE AND WITHOUT PRIOR OPPORTUNITY TO CROSS EXAMINE AN UNDISCLOSED KIAH MINCEY AFTER A DISCOVERY MOTION HAD BEEN FILED PURSUANT TO BRADY V. MARYLAND SUPRA, THAT PROSECUTION FAILED TO RESPOND TO, A DEFENSE MOTION FOR DISCOVERY, SUBSEQUENT TO TRIAL AND SENTENCING, DEFENDANT WAS TAKEN BY SURPRISE AND PREVENTED FROM RAISING ANY MOTIONS OR OBJECTIONS BY THE TRIAL JUDGE AND DEFENSE COUNSEL FAILED TO GIVE DEFENDANT NOTICE AND FAILED TO OBJECT PETITIONER RECEIVED A CUMULATIVE PENALTY WITHOUT BEING CHARED OR PROVEN OF THE ALLEGATIONS, SEE KILBOURN V. STATE, 9 CONN. 560, 563, 1833 WL 68 (1833) AS QUOTED IN APPRENDI V. NEW JERSEY, 530 U.S. 466 - "NO PERSON OUGHT TO BE, OR CAN BE, SUBJECTED TO A CUMULATE PENALTY, WITHOUT BEING CHARGED WITH A CUMULATIVE OFFENCE", HINES V. STATE, 26 GA. 614, 616, 1859 WL 2841 (1859) (REVERCING ENHANCED SENTENCE IMPOSED BY TRIAL JUDGE AND EXPLAINING [T]HE QUESTION, WHETHER THE OFFENCE WAS A SECOND ONE, OR NOT, WAS A QUESTION FOR THE JURY.... THE ALLEGATION [OF A PRIOR OFFENCE] IS CERTAINLY ONE OF THE FIRST IMPORTANCE TO THE ACCUSED FOR IF IT IS TRUE, HE BECOMES SUBJECT TO A GREATLY INCREASED PUNISHMENT"). ENACTMENT OF CRIME VICTIMS JUSTICE REFORM ACT DID NOT ALTER TRIAL COURT'S TASK OF WEIGHING

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TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

2348, 530 U.S. 466, APPRENDI V. NEW JERSEY, U.S. N.J. (2000)

UPON GRANTING CERTIORARI, THE UNITED STATES SUPREME COURT JUSTICE STEVENS HELD THAT (1) OTHER "THAN FACT OF PRIOR CONVICTION ANY FACT THAT INCREASES PENALTY FOR CRIME BEYOND PRESCRIBED STATUTORY MAXIMUM MUST BE SUBMITTED TO JURY AND PROVED BEYOND REASONABLE DOUBT AND (2) STATE HATE CRIME STATUTE WHICH AUTHORIZED INCREASE IN MAXIMUM PRISON SENTENCE BASED ON JUDGES FINDING BY PREPONDERANCE OF EVIDENCE THAT DEFENDANT ACTED WITH PURPOSE TO INTIMIDATE VICTIM BASED ON PARTICULAR CHARACTERISTICS OF VICTIM VIOLATED DUE PROCESS CLAUSE.

THERE WAS NO PRIOR CONVICTION OF DEFENDANT RELATED TO CHARGES CONVICTED OF -

THE DEFENDANT MUST HAVE HEARD AND UNDERSTOOD THE ACCUSATION AND HE MUST HAVE HAD A MOTIVE AND OPPORTUNITY TO DENY IT BEFORE THE DEFENDANT'S SILENCE CAN QUALIFY AS SUCH AN ADMISSION.

STATUTES AND RULES

U.S. CONSTITUTION AMENDMENT 14., U.S. CONST AMEND 4TH, 5TH, 6TH, 8TH

U.S. V. AGURS (1976) 427 U.S. 97, 49 L Ed 342, 96 S Ct. 2392.

~~GENTRY V. UNITED STATES (1927, CA 9 WASH) 22 F2d 67, AND ANNOTATION ADMISSIBILITY OF INCULPATORY STATEMENTS MADE IN THE PRESENCE OF ACCUSED AND NOT DENIED OR CONTRADICTED BY HIM, 80 ALR 1235.~~ ERROR EWB ERROR EWB

GRIFFIN V. CALIFORNIA (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229; MIRANDA V. ARIZONA (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602

CODE CIV. PROC. § 2033.280 AS ADDED IN 2004 PROVIDE IN PART THAT, IF A PARTY TO WHOM REQUEST FOR ADMISSION ARE DIRECTED FAILS TO SERVE A TIMELY RESPONSE, THAT PARTY WAIVES ANY OBJECTION TO THE REQUEST, UNLESS RELIEVED OF THIS WAIVER BY THE COURT UNDER SPECIFIED CIRCUMSTANCES, CODE CIV. PROC., § 2033.280 AS ADDED IN 2004, PROVIDES IN PART THAT, THE PARTY REQUESTING ADMISSIONS MAY MOVE FOR AN ORDER THAT THE GENUINENESS OF ANY DOCUMENTS AND THE TRUTH OF ANY MATTERS SPECIFIED IN THE REQUESTS BE DEEMED ADMITTED AS WELL ~~FOR A MONETARY SANCTION. THE COURT MUST MAKE THIS ORDER UNLESS IT FINDS THAT THE PARTY HAS PROPOSED A RESPONSE THAT IS IN SUBSTANTIAL COMPLIANCE WITH STATUTORY REQUIREMENTS.~~ ERROR EWB

OTHER

"BREAK IN CUSTODY" THE NO RECONTACT RULE, EDWARDS V. ARIZONA (1981) 451 U.S. 477, 101 S Ct. 1880, 68 L. Ed. 2d 378 §§ 129

UNITED STATES V. CRONIC - (1984) 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657, HOLLOWAY V. ARKANSAS SUPRA - ~~CONFRONTATION CLAUSE 6. AMEND~~ ~~[illegible]~~ ABSENCE OF COUNSEL

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GOVERNMENTS CLAIMS OF PRIVILEGE AGAINST DEFENDANTS CONSTITUTIONAL RIGHTS TO PRESENT DEFENSE IN CASES INVOLVING REQUEST FOR DISCOVERY OF INFORMATION OTHERWISE SUBJECT TO OFFICIAL INFORMATION PRIVILEGE. U.S. CONST. AMEND (6); PEN CODE §§ 1054 et seq; EVID. CODE § 1040. PEOPLE V. JACKSON 110 CAL APP 4TH 280, 1 CAL RPTR. 3d 561 (5TH DIST 2003). IN CONSIDERING THE ADMISSION OR REJECTION OF HEARSAY EVIDENCE IN AN ADMINISTRATIVE HEARING THE GOVERNING REGULATIONS OF THE ADMINISTRATIVE AGENCY INVOLVED AND APPLICABLE STATUTES MUST BE APPLIED AND ENFORCED. JACOBOWITZ V. U.S. CT CL 1970, 424 F. 2d 555, 191 CT. CL. 449 ADMINISTRATIVE LAW AND PROCEDURE 461. ADMINISTRATIVE LAW JUDGES WRITTEN DECISION DENYING MINOR BENIFITS FOR CHILDHOOD ASTHMA UNDER SUPPLEMENTAL SECURITY INSURANCE (SSI) PROGRAM FAILED TO IDENTIFY WHAT EVIDENCE OR INFERENCE JUSTIFIED DETERMINATION THAT MINORS ASTHMA WAS NOT SEVERE ENOUGH TO MEET MEDICAL LISTING FOR CHILDHOOD ASTHMA, AND THUS, REMAND WAS REQUIRED FOR EXPLANATION OF FINDINGS. BROWN EX. REL MC CURDY V. APFEL, C.A. 4 (N.C.) 2001, 11 FED. APPX. 58, 2001 WL 305834, UNREPORTED. SOCIAL SECURITY AND PUBLIC WELFARE ⇔ 149

PUBLIC AGENCY'S VIOLATION OF PRIVACY ACT THROUGH SUPERVISORS ACTIONS DURING INVESTIGATION INTO RUMOR REGARDING UNAUTHORIZED TRIP TAKEN BY EMPLOYEE, IN WHICH SUPERVISORS SOUGHT INFORMATION THROUGH THIRD PARTIES RATHER THAN COLLECTING INFORMATION DIRECTLY FROM EMPLOYEE WAS WILLFUL AND INTENTIONAL FOR PURPOSES OF DAMAGES WHERE AGENCY AND IT'S TOP MANAGEMENT WERE AWARE THAT

THEY WERE SUBJECT TO ACT YET TOOK NO ACTION TO INFORM OTHER EMPLOYEES OF THIS INFORMATION AND MADE NO EFFORT TO EDUCATE OR INSTRUCT EMPLOYEES ABOUT PROCEDURES AND SUBSTANCE OF ACT. DONG V. SMITHSONIAN INST. D.D.C. 1996, 943 F. SUPP. 69 RECORDS @ 31. RECORD OF INVESTIGATION (ROI) OF AUTOMOBILE ACCIDENT, WHICH OCCURED IN GERMANY, INVOLVING MILITARY DEPENDENT AND GERMAN CITIZEN WHO DIED AS A RESULT OF ACCIDENT, CONTAINED INFORMATION THAT WAS NOT SUFFICIENTLY ACCURATE OR COMPLETE SO AS TO ENSURE IT'S FAIRNESS TO DEPENDENT, AS WOULD SUPPORT AMENDMENT OF ROI PURSUANT TO PRIVACY ACT, ROI'S SUBJECT BLOCK CONTAINED DEPENDENT'S FULL NAME, BIRTH DATE, ADDRESS, AND NOTATIONS "FATAL TRAFFIC ACCIDENT" AND NEGLIGENT HOMOCIDE" WITHOUT FURTHER EXPLANATION THAT DEPENDENT WAS NEVER FOUND GUILTY OF THE OFFENSE, AND SUCH INFORMATION WAS SUBJECT TO DISSEMINATION. HOLZ V. WESTPHAL, D.D.C. 2002, 217 F. SUPP. 2d 50. RECORD @ 31; ARMY'S REPORT OF INVESTIGATION (ROI) OF MILITARY DEPENDENT FOLLOWING MOTOR VEHICLE ACCIDENT IN WHICH 18 YEAR-OLD DEPENENT WAS DRIVER AND GERMAN CITIZEN WAS KILLED WAS NOT CONNECTED TO POSSIBLE SECURITY RISK OR VIOLATION OF FEDERAL LAW, AS WOULD SUPPORT ARMY'S DENIAL OF DEPENDANT'S REQUEST FOR AMENDMENT OF RECORD TO ELIMINATE HIS NAME; THE ROI ITSELF EXPRESSLY ACKNOWLEDGED THAT THE CRIMINAL INVESTIGATION DIVISIONS (CID) LACKED AUTHORITY TO INVESTIGATE THE ACCIDENT, AS DEPENDENT WAS CIVILIAN AND NO FEDERAL CRIMINAL STATUTES WERE VIOLATED. HOLZ V. WESTPHAL, D.D.C 2002, 217 F. SUPP. 2d 50 ARMED SERVICES @ 4.

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ARGUMENT

SEE HOLMES V. SOUTH CAROLINA (2006) 126 S.CT. 1727, 540 U.S. 319, 164 L.Ed.2d 503, 74 USLW 4221 HOLDING THE UNITED STATES SUPREME COURT JUSTICE ALITO, HELD THAT EXCLUSION OF DEFENSE EVIDENCE THIRD PARTY GUILT DENIED DEFENANT OF A FAIR TRIAL ABROGATING STATE V. GAY, 343 S.C. 543, 541 S.E.2d 541 VACATED AND REMANDED.

WHILE PRIOR (ALLEGED) OFFENCE EVIDENCE MAY IN A PROPER CASE BE ADMISSIBLE FOR IMPEACHMENT EVEN IF FOR NO OTHER PURPOSE, THERE WAS NO JUSTIFICATION FOR ADMITTING EVIDENCE FOR IMPEACHMENT PURPOSES AND CONSEQUENTLY NO BASIS FOR DISTRICT COURT'S SUGGESTION THAT JURORS COULD CONSIDER THE (ALLEGED) PRIOR CONVICTION AS IMPEACHMENT EVIDENCE WHERE DEFENDANT DID NOT TESTIFY AT TRIAL. FED. RULES EVID. RULE 609, 28 U.S.CA. CRIMINAL LAW K 309.1; MOST TELLING OF MONGE'S DISTANCE FROM THE ISSUE AT STAKE IN THIS CASE IS THAT THE DOUBLE JEOPARDY QUESTION IN MONGE AROUSE BE CAUSE THE STATE HAD FAILED TO SATISFY IT'S OWN STATUTORY BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD COMMITTED A (ALLEGED) PRIOR OFFENSE (AND WAS THEREFORE SUBJECT TO AN ENHANCED, RECIDIVISM-BASED SENTENCE) 524 U.S. AT 725, 118 S.CT. 2246 ("ACCORDING TO CALIFORNIA LAW, A NUMBER OF PROCEDURAL SAFEGUARDS SURROUND THE ASSESSMENT OF PRIOR CONVICTION ALLEGATIONS: DEFENDANTS MAY INVOKE THE RIGHT TO A JURY TRIAL..., THE PROSECUTION MUST PROVE THE ALLEGATIONS BEYOND A REASONABLE DOUBT, AND THE RULES OF EVIDENCE APPLY") § CODE CIV. PROC. § 2031.010

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IN PROPER PERSON

EXHIBIT B PAGES 1-

Memorandum of Points of Authorities in

ARGUMENT

~~STATEMENT OF FACTS~~ PROPER IN SUPPORT OF GROUNDS 5 VIOLATION OF U.S. CONST AMENDMENTS 5TH AND 14TH DUE PROCESS AND EQUAL PROTECTION CLAUSES PURSUANT TO U.S. V. AGURS (1976) 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 FOR PROSECUTIONS FAILURE TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE AND SUPPRESSION

ARGUMENT

UNDER PROPOSITION 115, CRIMINAL DISCOVERY IN CALIFORNIA IS NOW GOVERNED BY STATUTE RATHER THAN JUDICIAL POLICY. WITH THE EXCEPTION OF EVIDENCE THAT TENDS TO EXCULPATE A DEFENDANT OR REDUCE PENALTY.

WITH THE ADOPTION OF THE CRIME VICTIMS JUSTICE REFORM ACT IS NOW GOVERNED BY CONSTITUTIONAL AND STATUTORY ENACTMENT.

PROPOSITION 115 ALSO ADDED A CHAPTER TO THE PENAL CODE SETTING FORTH BOTH SUBSTANTIVE AND PROCEDURAL RULES FOR DISCOVERY, ONE OF THE STATED PURPOSES OF THIS CHAPTER IS, "OR AS MANDATED BY THE CONSTITUTION OF THE UNITED STATES". THE U.S. SUPREME COURT HAS EMPHASIZED THAT EVEN AFTER AEDPA FEDERAL COURTS HAVE AN INDEPENDENT RESPONSIBILITY TO INTERPRET FEDERAL LAW- WILLIAMS V. TAYLOR (2000) 529 U.S. 362 [120 S.Ct. 1495, 146 L.Ed.2d 389]

IN U.S. V. AGURS (1976) 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392, THE SUPREME COURT STATED THAT FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES REQUIRE THAT THE SCOPE AND DUTY OF THE PROSECUTOR BE EXPANDED